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**In the Supreme Court of the United States**

**OCTOBER TERM, 1942.**

**No. 988.....**

**THE CLEVELAND TRUST COMPANY AND THE  
CENTRAL NATIONAL BANK OF CLEVELAND, OHIO,**

*Petitioners,*

**VERSUS**

**MICHAEL GEORGE STOLLER,**

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI**

**To the United States Circuit Court of Appeals  
for the Sixth Circuit, and**

**BRIEF OF PETITIONERS.**

**KERNS WRIGHT,  
Van Wert, Ohio,**

**LORIN L. HOGAN,  
Bryan, Ohio,**

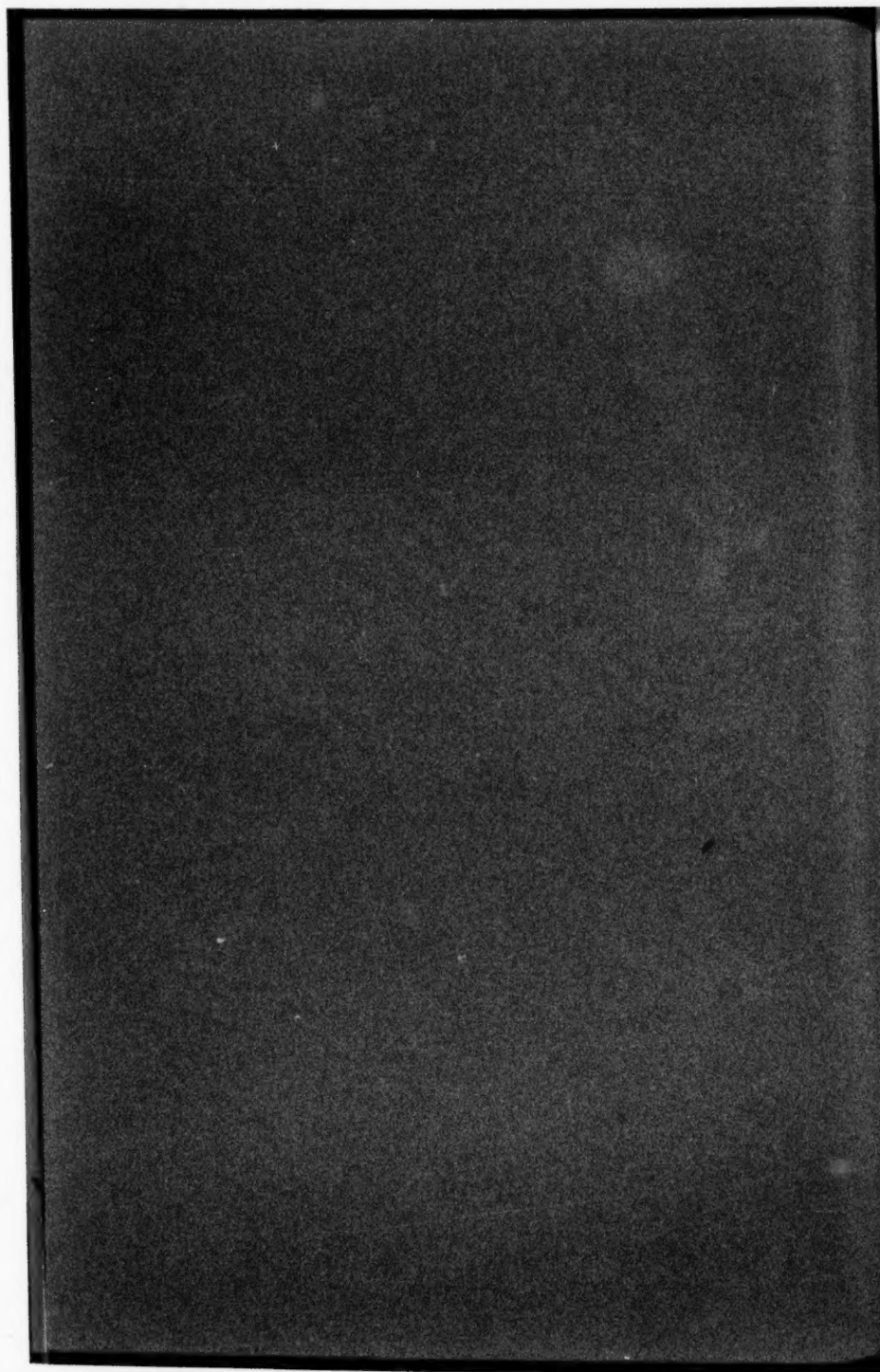
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**PETITION FOR WRIT OF CERTIORARI**  
**To the United States Circuit Court of Appeals**  
**for the Sixth Circuit.**

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*To the Honorable Chief Justice and Associate Justices of  
the Supreme Court of the United States:*

**STATEMENT OF MATTER INVOLVED.**

This case arises under Section 75 of the Bankruptcy Act (11 U. S. C. A. Sec. 203) relating to Agricultural Compositions and Extensions and involves the construction of 75(r) defining the term "farmer" within the purview of the Act.

The suit originated in the District Court for the Northern District of Ohio within one week after Respondent filed his petition as a farmer-debtor for a composition and extension of his debts. The Petitioners moved to dismiss his petition on the ground that Respondent was not a farmer as defined by the Act.

The District Judge referred the matter to the Supervising Conciliation Commissioner for the District as a Special Master to take testimony and report his findings.

The Master found and reported in favor of the Respondent (R. 24) but the District Judge sustained the objections of the Petitioners to such report and granted Respondent leave to file an amended petition under 4(a) of the Bankruptcy Act under penalty of dismissal (R. 190).

The Respondent did not elect to file an amended petition but availed himself of an appeal to the United States Circuit Court of Appeals for the Sixth Circuit.

The Circuit Court reversed the order of the District Court, remanding the cause for further proceedings in conformity to its opinion (*Stoller vs. Cleveland Trust Co.*, 133 Fed. (2d) 180) which decision the Petitioners now respectfully petition for review and determination.

This petition for a Writ of Certiorari is filed within ninety days from the entry of the Judgment of the Circuit Court and by reason of the additional jurisdiction provided in Section 73 (11 U. S. C. A. 201) and Section 25 (11 U. S. C. A. 48) of the Bankruptcy Act, and under the general powers granted by statute (28 U. S. C. A. 377) this Court may entertain this motion.

### QUESTIONS PRESENTED.

This case presents several interesting questions of importance relating to the interpretation of Section 75(r) of the Bankruptcy Act, and which have not been considered by this Court.

While the issue is whether Respondent is a "farmer" within the meaning of the Act, to conclude as to such issue, the interpretation of the phrase, "primarily, bona fide, personally engaged" within the first branch of the definition and the phrase, "principal part of whose income" in the second branch of the definition is involved.

It is contended that the Circuit Court erred in the following respects:

- (a) In finding that the net income of the Respondent, and not his gross income, was the proper

basis for determining "income" within the meaning of the definition.

(b) In selecting as the period of time for such computation, a one year period ending nine months prior to the filing of Respondent's petition.

(c) In failing to consider and apply the statutory requirement of determining whether Respondent is "primarily" engaged in farming operations.

(d) In failing to consider and apply the statutory requirement of determining whether the Respondent is "bona fide" engaged in farming operations.

(e) In failing to consider the conduct of the Respondent in respect to representing himself to be primarily engaged in a business enterprise, fraudulently soliciting and obtaining credit upon such representations and to find and determine that this conduct was such as to estop him from enjoying the benefits of the Act.

These errors of the Circuit Court present the following questions:

(a) Should the term "income" be construed as meaning "net" income or "gross" income?

(b) In determining "income" what period of time prior to the filing of the debtor's petition should be considered?

(c) Should the relative volume of a business enterprise and the farming operations of a debtor and his activities in connection therewith be considered in determining whether the debtor is "primarily" engaged in farming operations?

(d) Should the relative volume of the business enterprise and farming operations of a debtor and his activities in connection therewith, be considered in



determining whether the debtor is "bona fide" engaged in farming operations?

(e) May the conduct of a farmer-debtor in respect to representing himself to be primarily engaged in a business enterprise and fraudulently soliciting and obtaining credit upon such conduct and misrepresentations, be such as to estop him from enjoying the benefits of the Act?

### REASONS RELIED UPON.

We believe the decision of the Circuit Court in this case has added to the general confusion in defining the term "farmer" within the meaning of the Act.

1. In concluding the Respondent was a "farmer" by reason of his income, the Circuit Court considered "net" income as the proper yardstick upon which to base its determination. In the cases of *Baxter vs. Savings Bank*, 92 Fed. (2d) 404; *In re Day*, 10 Fed. Supp. 229; *In re Lindsay*, 41 Fed. Supp. 948; *In re Knight*, 9 Fed. Supp. 502; *In re Hilliker*, 9 Fed. Supp. 948; *Beamesderfer vs. First National Bank*, 91 Fed. (2d) 491, it would appear that "gross" income is the factor to be considered, and in this respect the decision appears to be in conflict with the decisions of other Circuit Courts of Appeal.

2. In determining the period of time prior to the filing of the debtor's petition for considering income, the Circuit Court seems to conclude that a year ending nine months preceding the filing of the Respondent's petition, is the proper period and time upon which to predicate a conclusion, and in this respect, has decided an important phase of the Act which has not been, but should be, settled by this Court.

3. In determining the Respondent was a "farmer," the Circuit Court found that the volume of his business enterprise and farming operations amounted to approxi-



mately \$260,000.00 for the period in question, of which farming activities according to Respondent (R. 143) amounted to \$35,163.35, or about one-seventh of his total income, but the Court seemed to conclude that as the debtor had been born upon a farm, that he now resided on a farm and devoted some time thereto, the decision of this Court in *First National Bank vs. Beach*, 301 U. S. 435, would hold that "he remained a farmer," in which respect the decision of the Circuit Court is probably in conflict with the decision of this Court.

4. In determining whether the Respondent is a "farmer" the Circuit Court did not consider, find or determine in which of the two enterprises he was "primarily" engaged, and whether his farming operations or his business enterprise was his first and basic concern. In this respect the Circuit Court is in error and the importance of such an analysis and determination in each case should be emphasized and established by this Court.

5. In determining the Respondent is a "farmer" the Circuit Court did not consider, find or determine the debtor was "bona fide" engaged in farming. In this respect the Court is in error and the importance of such an analysis and determination in each case should be emphasized and established by this Court.

6. In determining the Respondent is a "farmer" the Circuit Court did not consider, find and determine whether the conduct of the debtor, in respect to misrepresentations, fraud and similar conduct in connection with his business venture and the securing of credit from the petitioners and others, was such as would estop him from enjoying the benefits of the Act, in which respect the Court was in error as to an important question of Federal law which has not been, but should be settled, by this Court.

7. A decision of this Court in further defining, interpreting and construing Section 75(r) in reference to the

above matters, would clarify the situation and otherwise expedite and simplify the administration of the Bankruptcy Act, would be of great and public interest, particularly to those engaged in agriculture, business and finance, and would tend to renew confidence and to re-establish those business relations in which fear now obtains and undue caution prevails.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings herein and that the decree of the United States Circuit Court of Appeals for the Sixth Circuit be reversed by this Honorable Court and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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## BRIEF OF PETITIONERS.

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### GROUND'S UPON WHICH JURISDICTION IS INVOKED.

This case arises under Section 75(r) of the Bankruptcy Act (11 U. S. C. A. Sec. 203), which provides as follows:

“For the purposes of this section and section 4(b) the term ‘farmer’ includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur.”

The suit originated in the District Court for the Northern District of Ohio within one week after Respondent filed his petition as a farmer-debtor for a composition and extension of his debts. The Petitioners moved to dis-



miss his petition on the ground that Respondent was not a farmer as defined by the Act.

The District Judge referred the matter to the Supervising Conciliation Commissioner for the District as a Special Master to take testimony and report his findings. The Master found and reported in favor of the Respondent (R. 24) but the District Judge sustained the objections of the Petitioners to such report and granted Respondent leave to file an amended petition under Section 4(a) of the Bankruptcy Act under penalty of dismissal (R. 190).

The Respondent did not elect to file an amended petition but availed himself of an appeal to the United States Circuit Court of Appeals for the Sixth Circuit.

The Circuit Court reversed the order of the District Court remanding the cause for further proceedings in conformity to its opinion, *Stoller vs. Cleveland Trust Co.*, 133 Fed. (2d) 180, which decision the Petitioners now respectfully petition for review and determination.

This petition for a Writ of Certiorari is filed within ninety days from the entry of the judgment of the Circuit Court and by reason of the additional jurisdiction provided in Section 73 (11 U. S. C. A. 201) and Section 25 (11 U. S. C. A. 48) of the Bankruptcy Act, and under the general powers granted by statute (28 U. S. C. A. 377) this Court may entertain this motion.

#### **OPINION OF UNITED STATES DISTRICT COURT.**

*KLOEB, District Judge.*

I am of the opinion that the conclusion of the special master that the farmer debtor was primarily bona fide personally a farmer and that his principal income was derived from that source ought to be over-ruled and that the objections of the movants to the report of the special master ought to be sustained.

Each case involving the question of whether a debtor in bankruptcy was engaged in farming, so as to entitle him to the benefits that accrue to a farmer under the provisions of Sec. 75 of the Bankruptcy Act, should stand on its own bottom and be determined from the facts and from the record. *First Nat. Bank v. Beach*, 301 U. S. 435, 57 S. Ct. 801, 81 L. Ed. 1206 (1937).

I have concluded that Michael Stoller was basically, fundamentally and primarily engaged in the wholesale and retail seed business; that his interests lay there; that his energies and attention were primarily devoted there; and that instead of being personally engaged in the business of farming he was personally engaged in the seed business. I am further of the opinion from the record that the principal income that accrued to Michael Stoller during a period of years prior to the filing of his petition in bankruptcy was derived from the seed business, and I am further convinced that the substantial portion of his indebtedness that brought him to the bar of the bankruptcy court was incurred in the operation of that seed business. *Beamesderfer v. First Nat. Bank & Trust Co.* (C. C. A. 3d, 1937), 91 F. (2d) 491.

It is apparent from the record that the farmer debtor exercised supervision over the farm operations in that he was in the habit of giving directions to his foreman and workmen on the farm, especially in the mornings before proceeding to the conduct of his seed business. But supervision or property management is not sufficient to entitle one to the benefits of this section. *Baxter v. Savings Bank of Utica* (C. C. A. 5th, 1937), 92 F. (2d) 404.

It is also apparent that in the off season when his time and attention was not wholly concerned with the seed business he devoted more time to his farm, but there is very little in the record to indicate that he was personally engaged in farming or that he was basically and fundamentally a farmer and that this industry was his primary vocation. *In re Day* (D. C. Ill. 1935), 10 F. Supp. 229.

Objections to the report of the special master are sustained, Counsel may prepare an order in accordance with the foregoing memorandum, including therein a provision granting to the debtor the right to file an amended petition to bring this proceeding within the provisions of Sec. 4a of the Bankruptcy Act, such amended petition to be filed within twenty days of the date of entry of the said order. In default of the filing of such amended petition, an order may enter sustaining the motion of the secured creditors to dismiss the debtor's petition.

FRANK L. KLOEB,

*U. S. District Judge.*

October 11, 1941.

**OPINION OF UNITED STATES  
CIRCUIT COURT OF APPEALS.**

MARTIN, *Circuit Judge*.

One week after appellant had filed a petition as a farmer-debtor, for the composition or extension of his debts under Section 75 of the Bankruptcy Act, 11 U. S. C. A., § 203, the appellees, as creditors, moved to dismiss the petition upon the ground that appellant is not a farmer as defined in the Act. The district judge referred the motion to the supervising conciliation commissioner for the district, as special master to take testimony and to report his findings of fact and conclusions of law.

The master reported that the farming operations of appellant had resulted in a net profit, and the conduct of his seed business in a net loss; and that his financial difficulties had been caused by the operation of his seed business. The master reported, as findings of fact, that the principal part of the income of appellant for the year preceding the filing of his petition had been derived from products of the soil and from livestock and livestock products in unmanufactured state; and that the appellant was primarily bona fide

personally engaged in the production of products of the soil, livestock and livestock products in unmanufactured state.

The district judge sustained objections of the appellee-creditors to the report of the special master, and granted leave to the appellant-debtor to file, within twenty days, an amended petition under Section 4(a) of the Bankruptcy Act, 11 U. S. C. A., § 22(a), under penalty of dismissal of the debtor's petition upon his failure to do so. Appellant did not elect to file an amended petition; his original petition was accordingly dismissed at his cost; and he has prosecuted an appeal to this court.

In a memorandum opinion, the district judge concluded that appellant "was basically, fundamentally and primarily engaged in the wholesale and retail seed business; that his interests lay there; that his energies and attention were primarily devoted there; and that instead of being personally engaged in the business of farming he was personally engaged in the seed business"; that his principal income for a period of years prior to the filing of his petition had been derived from the seed business; and that "the substantial portion of his indebtedness that brought him to the bar of the bankruptcy court was incurred in the operation of that seed business." Citing *Beamesderfer v. First National Bank and Trust Co.*, 3 Cir., 91 F. 2d 491.

Supervision of farming operations, through instructions by appellant to his foreman and workmen on the farm before he proceeded to the conduct of his seed business in the morning, was deemed by the district judge insufficient to constitute appellant a farmer-debtor entitled to the full benefits of the Act. Citing *Baxter v. Savings Bank of Utica*, 5 Cir., 92 F. 2d 404. The observation was made that, in the off-season when his time and attention were not wholly concerned with the seed business, appellant devoted more time to his farm; but that "there is very little in the record to indicate that he was personally engaged in

farming or that he was basically and fundamentally a farmer," or that farming was his primary vocation (Citing *In re Day*, D. C., 10 F. Supp. 229).

[1] From study of the record, we cannot concur in the conclusion of the district judge that appellant was not a farmer, as defined in Section 75, sub. r, of the Bankruptcy Act, 11 U. S. C. A., 203, sub. r, but are in accord with the findings and conclusions of the master.

The authorities cited by the district court present facts far afield from those recorded in the instant case. *Beamesderfer v. First National Bank & Trust Co.*, *supra*, disclosed a situation where the petitioner did not live on his farm, but had rented it out. The farm had not been cultivated for five years, but had been used only for pasture. The petitioner owned a tobacco warehouse in the town of his residence, and his occupation for fifteen years had been buying and selling leaf tobacco. Practically all of his income had been derived from the tobacco business. He was properly adjudged not to be a farmer entitled to the benefit of the Agricultural Composition and Extension Act.

*Baxter v. Savings Bank of Utica, N. Y.*, *supra*, is of doubtful authority, in the light of the opinion of the Supreme Court in *John Hancock Mutual Life Insurance Co. v. Bartels*, 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. 176; but, however this may be, its factual situation bears no relevant resemblance to the instant justiciable controversy. The petitioner, Baxter, who was denied the benefits of a farmer-debtor status, was a Utica, New York, lawyer, who, eight months before filing his petition, had given up his law practice and, because of ill health, moved to Georgia, to a farm which he had previously acquired there. During residence on his farm, he merely superintended farming operations. The Court of Appeals probably took judicial notice that the new arrival, as a farmer, was a good lawyer.

*In re Day*, *supra*, was a case where the petitioner held not to be a farmer was a practicing civil engineer, and also

superintendent and county surveyor, who owned but did not live upon a farm which he rented to a tenant who occupied and cultivated it. The civil engineer devoted his time almost exclusively to the practice of his profession, and derived his income about equally from his profession and his farm.

In the instant case, the appellant farmer-debtor, now 42 years old, has lived in Paulding County, Ohio, for about 29 years; during which time, he has always resided on a farm—first on his father's and, from the age of 22, on his own farm. The first farm owned by him consisted of 160 acres. He steadily increased his farming activities until, in 1936 and 1937, he was operating 1785 acres of farm land.

The appellant regularly did a considerable portion of his farm work and personally directed the operations of farms owned or rented by him. He threshed his own crops and those of some of his neighbors and, as an outgrowth of these combined operations, he started a small seed business, the gross volume of which was some two or three thousand dollars for the first year. In the course of sixteen years, his seed business reached a peak of over \$350,000 in gross volume. The seed business exacted increasing demands upon his time, until he devoted somewhat more than half of his working hours to its care. During the rush season, the major portion of his time was devoted to this seed business, and during the slack season his farming operations were paramount in time consumption. At no time did he abandon active duties on his farm. He saw to the upkeep of improvements and the maintenance of the fertility of the soil which he farmed and, as the master put it, "followed all the practices of good husbandry."

There is controversy concerning his customary daily movements from his farm to the situs of his seed business in Paulding, Ohio; but it appears that his day began at the usual early hour for farmers, and that he constantly

performed some regular farm routine, gave instructions for farm operations, and prepared and kept records of the same; more adequately, indeed, than he kept the books of his seed business. However varied his activities, it is apparent from the record that the industrious appellant applied a most substantial portion of his time to the work of a "dirt farmer." He plowed, planted and husked corn; sowed wheat and oats; drilled and harvested beets; mowed alfalfa hay and clover; and ran a tractor and a combine, threshing machine, binder and reaper. He did most of the farm repair work and gave attention to drainage and tiling problems. The usual custom of appellant, after completing his most pressing farm work and instructing the farm hands, was to proceed to his seed house between eleven and twelve o'clock, and to return around four or five o'clock in the afternoon for the resumption of his part of planting, plowing, or whatever might be the order of the day upon the farm.

The seed business is seasonal, and requires heavy buying during harvest time and considerable selling during the early spring. Appellant made buying and selling trips to other states; maintained a business office and warehouse facilities for storage, and equipment for cleaning and grading seeds. He employed one man in his seed business virtually all the time; and, at the peak period, acquired the services of three or four men, in the main using the same men whom he employed on his farms. Appellant's total gross seed sales, including the produce of his farms, totaled the approximate amount of \$260,000 from May 15, 1939, to May 15, 1940. A Certified Public Accountant testified that the records of the seed business were insufficient to make possible an audit; but it is manifest that the financial straits of appellant were directly resultant from the operation of his seed business.

On the record before this Court, it is not possible to determine accurately the source of appellant's income.



Apparently, he kept his farm and his seed business records as a unit. He testified that the income statements which he prepared for the creditor banks were based on his combined operations. His testimony indicates that the major portion of his net income was derived from farming operations, but this testimony is neither established nor disproved by his own records. His reports to the Department of Agriculture indicate that his farming operations were profitable; and the fact that the preponderance of his debts were weighted upon him from the seed business is corroborative of his assertion that the principal part of his income was derived from farming.

The Act of Congress invoked by appellant must be liberally construed to give the debtor the full measure of relief afforded by Congress, "lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." *Wright v. Union Central Life Insurance Co.*, 311 U. S. 273, 279, 61 S. Ct. 196, 200, 85 L. Ed. 184. See, also, *John Hancock Mutual Life Insurance Co. v. Bartels*, 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. 176; *Kalb v. Feuerstein*, 308 U. S. 433, 60 S. Ct. 343, 84 L. Ed. 370; *Chapman v. Federal Land Bank of Louisville, Ky.*, 6 Cir., 117 F. 2d 321, 325.

The Supreme Court, in *First National Bank v. Beach*, 301 U. S. 435, 438, 439, 57 S. Ct. 801, 803, 81 L. Ed. 1206, has declared that, in determining in every case of this character whether the petitioner is a farmer because "personally bona fide engaged primarily in farming operations" or because "the principal part of his income was derived from farming operations," the totality of the facts must be considered and appraised. The Supreme Court would not attempt to fix the meaning of either of the two branches of the definition considered in the abstract, saying that the two are not equivalents but are used by way of contrast. The words "primarily engaged" in the first branch of the definition, and the words "income derived from farming

operations" in the second, were said not to constitute terms of art. Mr. Justice Cardozo wrote: "A farmer remains a farmer, just as a lawyer remains a lawyer, though the returns of his investments, while not enough to keep him going, are larger, none the less, than the profits of his labor. \* \* \* We emphasize the fact afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a content that may vary with the setting. [Citing cases.] In the setting of this enterprise, the totality of its circumstances, the roots of the respondent's income go down into the soil."

So, in the setting of the case here for decision and the totality of its circumstances, the roots of appellant's income would seem to go down into the soil. He is, therefore, entitled in full measure to the relief provided by the Act of Congress of May 15, 1935, c. 114, Sec. 3, 49 Stat. 246, 11 U. S. C. A., § 203, sub. r.

The order of the district court is reversed and the cause is remanded for proceedings in conformity with this opinion, so as to grant appropriate relief pursuant to the petition of appellant as a farmer-debtor.

### **STATEMENT OF THE CASE.**

The Circuit Court has well summarized the evidence of those phases of the case which it considered and determined and we will submit only the evidence relative to those phases which the Circuit Court overlooked and failed to appraise, and which we think are of paramount importance.

The record discloses that Respondent is 42 years of age, that he was born and raised on a farm, and has resided on a farm in Paulding County all his life (R. 86). In the past he was active in agricultural pursuits, overseeing as many as 1,785 acres in 1936 (R. 132), but having built up and established his wholesale and retail

seed business, he rapidly gave up his farming supervision, reducing his activities at the time of filing his petition, to the "home farm," of 435 acres, with large and pretentious buildings, located a few miles south of Paulding on U. S. Route 127, on which he resides, also one forty and one eighty acre tract. He employs four, five or six men on this farm, who were under control of his brother, John Stoller, as foreman, who also resides on this farm (R. 94).

The activities of Respondent, in this respect, is limited and restricted, as he himself so well expresses it, to "landlord work" (R. 133), that is, to the drainage problems, repairs on buildings, instructions to farm hands before leaving for his office in the mornings, and sometimes personal assistance in an emergency or during the harvest season, which is the slack time in the seed business (R. 94).

As to his wholesale seed business, he speaks with pardonable pride of his accomplishments. He explained he had commenced about sixteen years ago with a volume of \$2,000.00 or \$3,000.00 a year, and built it up from this modest beginning to as high as \$356,726.34 in 1937 (R. 86), and to at least \$227,888.72 (Bank's Exhibit 11) for the year preceding the filing of his petition.

In describing his business he stated that it consisted of the buying of all forms of field seeds, processing, packaging and selling of the same, both wholesale and retail. His wholesale business was either in carload or truckload lots. Purchases were made in the West, particularly in the Dakotas, Iowa, Minnesota, and Montana (R. 118), with imports from Roumania (R. 87), processed in Paulding, Ohio, and sold mostly in the East (R. 87). His retail business was confined principally to an area of three hundred miles adjacent to the village of Paulding, Ohio (R. 87).

In connection with his business he maintained an extensive mailing list, in fact, it was so extensive that he

used a special franking privilege (R. 87). He advertised widely in farm papers, circulars and price cards (Bank's Exhibits 2, 3 and 4). He usually carried an inventory of from 10,000 to 50,000 bushels of seed, and in addition to seeds, he dealt in Inoculation Bacteria, Disinfectants, Fertilizers and Bags (R. 88). In addition to his business of wholesaling and retailing seeds, he also cleaned and processed seed for all of his customers (R. 211-212).

All of his business was conducted at the Stoller Seed House which comprised an office consisting of two large rooms, one being a display and sales room, the other for his office help, bookkeeper and cashier. To the rear of his office and in the same building he maintained a warehouse (R. 211-212), a part of which is controlled by The Douglas-Guardian Warehouse Company of Chicago, with whom he has warehouse arrangements, whereby a part of his seed is warehoused with that Company and on which warehouse receipts are issued.

In the remaining part of his warehouse he keeps what is known as "free seed," that being his seed which is not pledged. He also operates a mill for cleaning of seed. At R. 223 the Respondent testified:

"We have a regular set-up for doing business, filing system for seed, as well as letter copies, an adding machine, filing cabinet, sales registry, shelving and display counters, cleaning equipment, moisture testing equipment, threshing machine, clover huller, cleaning machinery, gravity cleaner, platform scales and counter scales."

In the operation of his business he employs a bookkeeper, also employs several other girls and men,—the girls working in the office in the preparation of mailing lists and advertising the seed business,—the men being employed in the warehouse and mill in the handling, cleaning and processing of seed (R. 88, 116-118). At the time of filing his petition his business was "going full blast" (R. 117).

Obviously his business was a "one man business." He personally did the buying, seeing to the processing and packaging and handling of all sales except perhaps small retail items (R. 87, 88). This necessarily required much travel in the Dakotas and other western states and in the East. He testified that in the year preceding the filing of his petition, he made trips to Buffalo, Chicago, Montana, North and South Dakota, Fort Wayne, Cincinnati and other towns in the vicinity of Paulding, Ohio (R. 118).

A witness, testifying as to the amount of time which the Respondent devoted to his business, stated (R. 123):

"I asked if he was going home to supper and he said 'No, he ate supper up town because invariably he came back and worked,' and when I mentioned the fact to him that his records were not complete, that he should have more help to maintain the records, and he said 'I know' and he said 'It is necessary for me to work late at night in order to keep this business going'."

In the spring of 1940 the Respondent negotiated a loan of \$15,000.00 with one of the Petitioners, the Cleveland Trust Company. In procuring this loan he submitted three financial statements (Bank's Exhibits 7, 8, and 9), covering the years 1937, 1938 and 1939. Each of these financial statements purported to be of the Stoller Seed House and reflected the financial condition of his seed business. He also represented to the bank that while he lived on a farm, he was engaged in the seed business. The financial statement covering the year 1937 (Bank's Exhibit 7) reported gross sales in his seed business amounting to \$356,726.34. His gross sales, as shown by his statement covering the year 1939, amounted to over \$302,000.00 (R. 213).

About three weeks later, in May of 1940, the Respondent negotiated a loan from the other Petitioner, the Central National Bank of Cleveland, in the amount of \$12,500.00, and submitted a financial statement of the Stoller Seed

House business, labeled "wholesale and retail seed business" (Bank's Exhibit 11, R. 181), which covered the period of time from May 15, 1939, to May 15, 1940, and shows gross sales amounting to over \$236,000.00, and a net profit of over \$12,000.00.

In procuring this loan he made like representations that he was engaged in the seed business and the money was needed for it. The financial statement purports to be entirely confined to the financial condition of his seed business, as the statement shows among other assets listed therein, real estate valued at \$72,500.00 *not used in business*. This real estate was his farm property. Respondent admits he did not include debts or farm chattels, for the reason "they didn't ask for it" (R. 92, 215).

Financial statements (Bank's Exhibits 8, 9 and 22, R. 90, 101, 119, 120) were subsequently submitted in due course of business; the latter was for submission to the Merchantile National Bank of Chicago and included the same period of time as that to the Central National Bank but there is quite a variance in these statements, both as to assets and earnings.

Considerable time and effort was spent by Petitioners to elicit further proof of the full extent of the financial affairs of the debtor, but as stated by the Circuit Court he did not have a system of bookkeeping or records from which the true net or gross incomes could be determined. The only records of the debtor consisted of a sales register and sales slips which took care of his retail business only (Bank's Exhibit 18), and not entirely so. He kept no record of his wholesale business other than in his letter files (Bank's Exhibit 19). During the year preceding this proceeding most of his business was done on the cash basis, and not by check.

A diligent effort was made to make an audit of his financial affairs. A Certified Public Accountant spent several days in an attempt to ascertain the status of his

income (R. 126) but as stated by the Circuit Court, his records were such as to make an audit impossible or to determine the source of the Respondent's income.

It also may be pertinent to note that the Respondent did not have a farm record for any previous year (R. 112-113), that the farm record for the current year was not prepared by the Respondent until during the course of the hearing (R. 227-228), and that it was only after repeated requests and demands, and a mandatory order from the Master that any records were produced. The farm record is purely a statement prepared by the debtor in his effort to show a net income from his farm operation, and to that end is purely a self serving declaration.

The Respondent himself was reluctant to be certain in his statements, qualifying his testimony to "about," "approximately," "as near as I can tell," and similar equivocation. The Respondent admitted that he did not know how much money he made in the year 1939 (R. 213).

The determination of the amount of his income is further confused by his income tax returns, or lack of returns. He testified that he made no return for the year 1938 (R. 90, 94), and that he did not pay any income tax for the year 1939 (R. 95).

About thirty days after the \$12,500.00 loan was procured from the Petitioner, the Central National Bank, it learned through its clearing house arrangements of the \$15,000.00 loan made by the Petitioner, the Cleveland Trust Company. The Petitioners immediately brought this fact to the attention of the Respondent, and, in endeavoring to enforce the payment of their respective loans, filed suits and recovered judgments thereon in the Court of Common Pleas of Paulding County, Ohio, in September and October of 1940. While the sales on execution were being advertised, the Respondent on November 7, 1940 filed his farmer-debtor petition to forestall further action on the judgments.



**SPECIFICATION OF ERRORS.**

The specific errors complained of and brought forward by the petition for a writ of certiorari, in the order therein presented, are:

(a) In finding that the net income of the Respondent, and not his gross income, was the proper basis for determining "income" within the meaning of the definition.

(b) In selecting as the period of time for such computation, a one year period ending nine months prior to the filing of Respondent's petition.

(c) In failing to consider and apply the statutory requirement of determining whether Respondent is "primarily" engaged in farming operations.

(d) In failing to consider and apply the statutory requirement of determining whether the Respondent is "bona fide" engaged in farming operations.

(e) In failing to consider the conduct of the Respondent in respect to representing himself to be primarily engaged in a business enterprise, fraudulently soliciting and obtaining credit upon such representations and to find and determine that this conduct was such as to estop him from enjoying the benefits of the Act.

These errors of the Circuit Court present the following questions:

(a) Should the term "income" be construed as meaning "net" income or "gross" income?

(b) In determining "income" what period of time prior to the filing of the debtor's petition should be considered?

(c) Should the relative volume of a business enterprise and the farming operations of a debtor and his activities in connection therewith be considered in de-

termining whether the debtor is "primarily" engaged in farming operations?

(d) Should the relative volume of the business enterprise and farming operations of a debtor and his activities in connection therewith be considered in determining whether the debtor is "bona fide" engaged in farming operations?

(e) May the conduct of a farmer-debtor in respect to representing himself to be primarily engaged in a business enterprise and fraudulently soliciting and obtaining credit upon such conduct and misrepresentations, be such as to estop him from enjoying the benefits of the Act?

### **ARGUMENT.**

The argument of the Petitioners may be summarized by the statement:

That the Circuit Court erred in construing "income" as meaning "net" income; in determining the period of time for computing such income, at other than at the time of filing the petition and of too short a period; in failing to determine whether the Respondent was "primarily" engaged or "bona fide" engaged in farming operations, and in failing to consider the fraudulent conduct of the Respondent to be such as would estop him from claiming the benefits of the Act.

It is further contended that these errors should be reviewed for the reason that the decision is in conflict with that of another Circuit Court of Appeals; that it is in conflict with the decision of this Court, and that it presents several questions of Federal law which have not been, but should be, settled by this Court in the interests of justice to the Petitioners and to clarify and otherwise expedite and facilitate the administration of the Bankruptcy Act.

These errors and the questions are presented in the order named:

**A. Should the Term "Income" be Construed as Meaning "Net" Income or "Gross" Income?**

The Circuit Court is decidedly in error in concluding that "net" income is the proper basis in determining whether the principal part of the Respondent's income is derived from farming operations. First, because "gross" income would better appraise the situation, and is the rule which has been generally adopted by the courts, second, because the records of the Respondent, as determined by the Circuit Court, were such that it was impossible to determine the amount or from which enterprise the income was received, and, third, because the amount of the gross income from farming operations, according to Respondent's own statement, is only one-seventh that which he received from his business enterprise (R. 143).

We think the "gross income" rule as generally adopted by the courts should have been followed. In *In re Knight*, 9 Fed. Supp. 502, the Court states that:

"And 'income' I construe to mean 'gross income.' Otherwise, when, by drought or depressed market conditions, the agricultural producer operates at a loss, he would cease to be a farmer entitled to the benefits of the Act, if he had any net income from nonfarming operations. Certainly Congress did not intend that such a producer should cease to be a 'farmer' and lose the benefits of the Act at the very time when he is most in need."

In *In re Hilliker*, 9 Fed. Supp. 948, it was also held that the word "income" means the gross income as distinguished from net, stating at page 949:

"Suppose a man with a city merchandising business has five acres of land on which he does not live and which produces some sort of fruit or other soil products, and happens to find that his merchandise business in stress of poor times does not yield a profit and, nevertheless, received a profitable return from the fruit on the land. Can it be thought that he should be

rated as a farmer and entitled to the benefits of the provisions of Section 75? The answer, of course, must be 'No.' "

And this Court in the case of *First National Bank vs. Beach* (*supra*), had under consideration the total gross income which was derived from the farming operations of the debtor, and there was no attempt in that case to require or to find that the debtor had a "net" income from his farming operations.

It is also apparent that in the case of *Beamesderfer vs. First National Bank and Trust Company*, 91 F. (2d) 491, only gross income was considered. The facts in this case are parallel in the respect that the indebtedness arises out of a mercantile business.

The decision of the Circuit Court would also appear to be quite inconsistent. In its analysis of this phase of the case it found that the Respondent's business records were insufficient to bear an audit by a certified public accountant, and that it was impossible to accurately determine the source of Respondent's income, yet it followed with a finding that the principal part of Respondent's income was from farming operations and it predicated its conclusion on the latter. It would seem to be a conclusion without a premise.

Again the Court found that the Respondent's total gross seed sales, including farm produce, amounted to \$260,000.00 in the year selected by the Court. The Respondent himself (R. 143) places his farm income in the same period at \$35,163.35 or approximately one-seventh of the total, yet the Court finds that this principal part of his income "goes down into the soil."

The Court found that Respondent's records were of no value for accounting purposes, yet concludes that his testimony as to the major portion of his "net" income is derived from farming operations is neither established nor disproved by his records. Surely some burden is upon a

debtor to maintain his claim as to income. The reasoning of the Circuit Court enables and encourages a debtor to destroy or to not keep records in order that only his statements may be relied upon.

The Court must have overlooked the Respondent's financial statements, showing approximately 10% profit on gross sales of seeds, the 90% being costs of merchandise sold. For the accounting period selected by the Circuit Court, his purchases would amount to \$234,000.00.

Obviously the Court must have been confused.

**B. In Determining Income, What Period of Time Prior to the Filing of the Debtor's Petition Should be Considered?**

This would seem to be a very important factor in determining whether the principal part of the debtor's income is derived from farming operations or from other sources. The Circuit Court arbitrarily selected a period of one year, ending May 15, 1940 and nine months prior to the filing of his petition on November 7, 1940. This would not appear to be fair either as to length of time or in relation to the date of filing. The nine months immediately preceding the filing may or may not show a much different financial picture.

The period that would more accurately appraise the income status of the debtor would be that which obtained at the time he filed his petition, and for such a period preceding as would include his usual and ordinary vocation and manner of living. We are partial to the five year period as considered by this Court in *First National Bank vs. Beach*, 301 U. S. 385.

To adopt another rule or shorter period as did the Circuit Court, would permit or enable an individual who is primarily engaged in a business enterprise, upon deciding that his business would temporarily operate at a loss, to purchase an equity or to remove to a farm in which he had

an equity, and after residing thereon for a few weeks or months to then obtain a composition and extension of his business obligations. The advantage that may be so taken of such a rule is indicated in this case. The farm which the debtor owns and where he resides is a few miles from his place of business. It is encumbered by a mortgage of approximately \$40,000.00, leaving but a small, if any, equity in the Respondent.

While the Circuit Court observed a Certified Public Accountant could not determine from Respondent's records as to his income and the Court concluded that it was not possible to determine the source of Respondent's income, yet by Respondent's own statements, his gross for 1937 was \$356,726.34. For some unexplained reason his operating report for 1938 was not available, but the assets were in line; for 1939, \$203,000.00 and for the year ending May 15, 1940, \$236,000.00.

Obviously his "income" for any nine month or annual period would vary and perhaps change the status of the debtor as within or without the "income" definition. The Circuit Court erred in this respect, and would seem to be at variance with this Court.

It is unfortunate that the Congress did not go into more detail in its definition. The term gross or net income could have been stipulated, the period of time could have been provided and resultant confusion avoided. We appreciate the difficulty of phrasing a general interpretation and it must necessarily be applicable to the individual case, but it should be of such length of time as will fairly establish usual and customary vocation and manner of living at the time of filing his petition. In any event, the disapproval of the period adopted by the Circuit Court would tend to emphasize the importance of careful consideration of this phase of the definition.

**C. Should the Relative Volume of a Business Enterprise and the Farming Operations of a Debtor and His Activities in Connection Therewith be Considered in Determining Whether the Debtor is "Primarily" Engaged in Farming Operations.**

The evidence relating to the Respondent's farming operations and business activities, definitely establish the fact that at the time of filing his petition and for a period of sixteen years, he had been engaged in operating a wholesale seed business, and also in farming a considerable acreage. This requires the determination in which of the two was he "primarily" engaged within the meaning of the Act.

It is contended that the Circuit Court, in arriving at its decision, did not consider and entirely ignored the requirement that he must be "primarily" engaged in farming operations.

While the Court recognized that the Respondent was "personally" engaged, both in farming and in conducting his seed business, we fail to find where the Court specifically held that he was "primarily" engaged in either of the two enterprises and in this we think the Court erred. In arriving at its decision the Court cited the case of *First National Bank vs. Beach*, 301 U. S. 435, 438, 439, in which it was held:

"The words 'primarily engaged' as we find them in the first branch of the definition does not constitute a term of art. The words 'income derived from farming operations' does not constitute such a term. In each case the totality of the facts is to be considered and appraised."

But the Court failed to show the application of the law as announced in that case to the facts in the instant case.

In *In re Day*, 10 Fed. Supp. 229, the Court well defined the word "primarily" as meaning basically, or in such manner as to be of first importance. It, therefore, is to be



determined what is the chief interest of the Respondent. Was it his farm or his seed business? In arriving at a conclusion it is well to consider what the Respondent himself admitted as being his primary and chief concern.

It is to be observed that in the management of the seed business he was so concerned that he would not delegate authority to any one. He personally attended to the buying, the processing, the packaging, the selling, the financing and advertising. In fact, he followed the Franklin adage "that if you wish a thing well done, do it yourself." To start from scratch and build a business to over \$350,000.00 annually necessarily required his time, efforts and personal attention. Such an accomplishment requires initiative and executive ability that is seldom for hire.

This was not true of the farm. As to its management, he delegated almost every operation, excepting that which is usually reserved to ownership. It was the four, five or six men that he maintained under the supervision of his brother as foreman (R. 94) who personally tilled and cultivated the land.

Then too, the amount of time which he devoted to his business is indicative of his concern. The Circuit Court found that the Respondent did devote more than half of his time in the management of his business, but we submit the record fairly shows that he gave a far greater portion than half. His own secretary stated that he worked in his office at least half of the time during the day and frequently at nights (R. 170-171), and he told the Deputy Revenue Collector that he frequently ate his evening meal in town so as to continue his work during the night.

Another yardstick in determining what is his chief concern, is what he, himself, said it was. In all of his advertising, Dun and Bradstreet reports, and in his many financial statements, he stated that he was a business man engaged in the wholesale and retail seed business. It was not until he was pressed by suits and filed his petition,

did he change and for the first time assert himself to be a "farmer." By all these means by which the interest or concern of an individual may be ascertained, the Respondent's primary, basic and chief concern was his seed business.

The Circuit Court in arriving at its decision was apparently influenced or impressed by the fact that the Respondent always lived on and operated a farm, and attached little, if any, importance to the further fact that he had also conducted a seed business for a period of sixteen years to such extent that it reached a gross volume of \$350,000.00 annually. Because the Circuit Court specifically found "the seed business exacted increasing demands upon his time until he devoted somewhat more than half of his working hours to this work," the Court's decision should have followed this finding of fact, as it is one of the major factors by or through which the Respondent's chief or primary interest is determined. We cannot reconcile the Court's decision with such finding of fact.

We think the Court's reliance upon the case of *First National Bank vs. Beach* (*supra*) does not constitute sufficient authority for the position taken by the Circuit Court, as the facts in the *Beach* case bears no relevant resemblance to the facts which are here in controversy. In that case the Court specifically found that the debtor-farmer was not engaged in any occupation other than farming, and said:

"The critical fact is that the debtor worked an acreage large enough to count, *that he did not work at anything else*, and that he gave to this work, whether profitable or unprofitable, the major portion of his time."

In the instant case the Respondent was decidedly engaged in a mercantile business of huge proportion to which, the record shows, he devoted more than half of his time.

**D. Should the Relative Volume of the Business Enterprise and Farming Operations of a Debtor and His Activities in Connection Therewith be Considered in Determining Whether the Debtor is "Bona Fide" Engaged in Farming?**

Another word of limitation contained in the statute is the word "bona fide" which should be given equal consideration with the words "primarily" and "personally."

Obviously, the good faith of a debtor is of primary importance. Otherwise the Act could be used as a means of perpetrating fraud on creditors. In any year the earnings of a business may fluctuate from the unexpected windfall to an unforeseen loss and a business man by the simple expedient of residing on a farm or by giving some supervision thereto, could forestall his business creditors by claiming to be a "farmer."

The record should have been closely scrutinized by the Circuit Court, as to the comparative time, attention and efforts devoted by the Respondent to his two enterprises, and it should have been clearly determined that such activities as were devoted to his farming operations were "bona fide" and not for the purpose or with the intention of creating and establishing an opportunity of taking advantage of the Act, should his business enterprise become jeopardized.

Such consideration is particularly pertinent in this case in view of the facts and circumstances. The Circuit Court found that his business enterprise reached a peak of \$350,000.00 annually. That during the particular period of time which it considered, the gross income amounted to \$260,000.00 which included some income from the farm on which he resided. The Court also found that his bookkeeping was such as to make impossible an audit or a determination of his source of income and that his financial status was directly resultant from his business activities.

These findings in and of themselves should not only have excited inquiry, but they present a record that is hardly compatible with a conclusion that his farming activities were "bona fide." The importance of such an analysis and determination in all cases, particularly those cases in which the debtor has substantial interests other than farm operations, is quite evident and the necessity of such analysis and approval should be emphasized by this Court.

**E. May the Conduct of a Farmer-Debtor in Respect to Representing Himself to be Primarily Engaged in Business Enterprise and Fraudulently Soliciting and Obtaining Credit Upon Such Conduct and Misrepresentations be Such as to Estop Him from Claiming the Benefits of the Act?**

Regardless of the consideration of "bona fide" as a term of the definition, we believe the "bona fide" or good faith of the debtor is subject to and should be considered by the Bankruptcy Courts under their general equitable powers.

As the Master summarizes, and as outlined in the statement, the Respondent has continuously posed and held himself out as engaged in the wholesale and retail seed business by letters, pamphlets, circulars, catalogues and other media of advertising; he from time to time soliciting credit for the financing of his business, representing himself and specifically stating that he was engaged as a wholesale and retail seed merchant, and went from bank to bank seeking to obtain this assistance.

Both Petitioner banks were given to understand, in their discussions with him of the nature and extent of his business, its volume, markets, etc., that he was engaged in the wholesale and retail seed business, although he resided on a farm, and Respondent knew they had this understanding (R. 213). Had there not been such an understanding, the officers with whom he dealt would not have made the

loans, their authority being restricted by policy and custom to commercial loans.

The Respondent reluctantly admitted falsifying the financial statements by omitting large and substantial obligations (R. 215), and purposely listing his home farm and not his farm chattels and machinery, so as to obtain a business rating. Then, when his fraud was discovered and payment was demanded of his business obligations he, then, for the first time, claims to be a "farmer" and seeks use of the Act as a means of avoiding payment of his just business debts.

The Petitioners are not asking that Respondent be refused bankruptcy, but, on the contrary, are urging that he be so declared. They are merely demanding that he not be permitted to take advantage of the special provisions for "farmers" but must be bound by the Bankruptcy Act, which should and would protect him to that extent to which he deserves.

Regardless of his status under the definitions and assuming for the purpose of argument and for that purpose only, that Respondent does come within the purview of the Act, he has, by his own inequitable conduct, forfeited every right and privilege to which he might be entitled.

Social legislation, commendable as it is, is usually vulnerable to the unscrupulous. This fact was recognized and mentioned by the President in commenting on this Act in one of his Fire Side Chats. Great care and consideration must be exercised in shielding and protecting such legislation to discourage and avoid it being made an instrument of fraud.

The Circuit Court erred in failing to consider and determine such a factor in this case and the importance of such consideration should be emphasized and established by this Court in the interests of the public weal.

In conclusion, your Petitioners respectfully pray the Court to order the United States Circuit Court of Appeals

for the Sixth Circuit to certify and to send to this Court for its review and determination a transcript of the record and proceedings herein, for the following reasons:

(1) The questions raised by the decision of the Circuit Court of Appeals, as enumerated in the Petition for a Writ of Certiorari, present new and important questions of national interest which have not heretofore been decided by the Supreme Court of the United States.

(2) In its decision the Circuit Court of Appeals incorrectly distinguished and failed to follow the case of *First National Bank vs. Beach*, 301 U. S. 385, which is a controlling decision of this Court and one of the leading decisions in the United States defining the term "farmer."

Respectfully submitted,

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